

Nos. 23-12408-E & 23-12411-J (consolidated)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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BLAKE WARNER,  
*Plaintiff-Appellant,*

v.

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,  
*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Middle District of Florida  
(8:23-cv-00181-SDM-JSS & 8:23-cv-01029-SDM-SPF)

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## ARGUMENT

Appellee filed a one-and-a-half-page response brief stating generally that it believes the district court properly applied this Court's precedents, but taking "no position on Warner's assertion that the precedent is wrong." Appellee's Br. at 2.

Appellant wishes only to reiterate, as he explained in his opening brief, that the "precedents" in question are all unpublished—except for *Devine*. See Appellant's Br. at 9 (citing *Devine v. Indian River Cnty. Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997), *overruled in part by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007)). Thus, they are not precedents. See 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."); Fed. R. App. P. 36, I.O.P. 7 ("The court generally does not cite to its 'unpublished' opinions because they are not binding precedent.").

As explained in the opening brief, *Devine* does not support the district court's judgment for three reasons. First, its holding was narrow, applying only to cases under the Individuals with Disabilities Education Act (IDEA),

20 U.S.C. § 1400 *et seq.* See *Devine*, 121 F.3d at 581-82. Second, that holding was expressly overruled by the Supreme Court in *Winkelman*, 550 U.S. at 535. Third, even if *Devine* were binding, it did not hold that dismissal of the child's claim was the proper remedy. Nevertheless, courts in this circuit have mistakenly treated *Devine* as requiring the counsel mandate. See Appellant's Br. at 30-31 n.7 (collecting cases).

Thus, the district court's *sua sponte* decision could not have "correctly applied this Court's precedent." Appellee's Br. at 2. To the best of Appellant's knowledge, there was no precedent to apply. This Court is free to reach the unresolved legal dispute on the merits.

## CONCLUSION

This Court should reverse.

Dated: February 1, 2024

Respectfully submitted,

BAKER BOTTS, LLP

/s/ Matthew P. Erickson

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the page and type-volume limitations of Fed. R. App. P. 32(a)(7), because it contains 297 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typespace using 14-point Palatino Linotype.

/s/ Matthew P. Erickson

Matthew P. Erickson

### **CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2024, I electronically filed this brief and thereby served all counsel of record through the Court's CM/ECF system.

/s/ Matthew P. Erickson

Matthew P. Erickson